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| DOCKET NO. CV-15-6055458-S | : | SUPERIOR COURT |
| CECILIA PFISTER, ET AL. | : | JUDICIAL DISTRICT OF NEW HAVEN |
| V. | : | AT NEW HAVEN |
| MADISON BEACH HOTEL, LLC, ET AL. | : | MARCH 6, 2017 |





**MEMORANDUM OF DECISION**

**MOTIONS FOR SUMMARY JUDGMENT (NOS. 170, 173)**

FACTS

This case arises out of a dispute between Madison residents and a hotel that organizes outdoor concerts to the dissatisfaction of its residential neighbors. On May 11, 2016, the plaintiffs[1] filed the operative amended complaint; (Docket Entry no. 151); against the defendants, Madison Beach Hotel, LLC, Madison Beach Hotel of Florida, LLC, and the town of Madison. The plaintiffs allege the following relevant facts. The plaintiffs are all owners of single family residences in Madison, Connecticut. (Am. Compl. ¶¶ 1-9; Docket Entry no. 151.) The defendant, Madison Beach Hotel, LLC, owns property situated at 86 and 88 West Wharf Road in Madison; while the defendant, Madison Beach Hotel of Florida, LLC, is the operating entity of the Madison Beach Hotel.[2] (Am. Compl. ¶¶ 10-11; Docket Entry no. 151.) The town of Madison owns an

[1]The plaintiffs will be collectively referred to as "the plaintiffs," and are as follows: Cecilia J. Pfister, Margaret P. Carbajal; Katherine Spence; Schutt Realty LLC; Emile J. Geisenheimer; Susan F. Geisenheimer; Henry L. Platt; Douglas J. Crowley; and 33 MBW, LLC. Schutt Realty withdrew from the action on May 23, 2016 (Docket Entry no. 161).

[2]Madison Beach Hotel, LLC and Madison Beach Hotel of Florida, LLC will be collectively referred to as "the hotel defendants."

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area south of the hotel and on the west side of West Wharf Road, known as "the grassy strip." (Am. Compl. ¶ 12; Docket Entry no. 151.) The hotel defendants have utilized the "grassy strip" in the operation of the hotel. (Am. Compl. ¶ 14; Docket Entry no. 151.) "In the course of said operation, [the hotel defendants] have permitted and/or caused the transmission of amplified sound and music thereby causing excessive noise to reach Plaintiff Pfister's residence." (Am. Compl., Count One, ¶ 15; Docket Entry no. 151.) "During this period and in the course of such operation [the hotel defendants] also have permitted and/or caused traffic congestion and the obstruction of private and public ways so as to interfere with Plaintiff Pfister's and others' access to Plaintiff Pfister's residence." (Am. Compl., Count One, ¶ 16; Docket Entry no. 151.) The plaintiff repeats the language of paragraphs fifteen and sixteen of count one as to each of the plaintiffs in counts two, three, four, five, six, seven, eight, and nine. "[The hotel defendants] have used and continue to use unreasonably and unlawfully both their properties and the property owned by defendant Town of Madison." (Am. Compl. ¶ 17; Docket Entry no. 151.) All paragraphs in counts one through nine, including the ones mentioned here, are incorporated into counts ten and thirteen. The plaintiffs seek redress in count ten for alleged violations of a variance by the hotel defendants and in count thirteen for alleged violations by the hotel defendants of local zoning regulations.

On August 15, 2016, the hotel defendants filed a motion for summary judgment as to counts ten and thirteen; (Docket Entry no. 170);[3] accompanied by a supporting

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[3]The defendants' exhibits include: an affidavit of John DeLaura along with exhibits (A) a certificate of decision regarding a variance; (B) a property survey of West Wharf Road and Parker Avenue; (C) an aerial photo of 88 Wharf Road; (D) a letter dated February 17, 2016, from an attorney representing the Madison Beach Preservation Association, an organization to which the plaintiffs belong, to Madison's Chief Zoning Enforcement Officer; (E) a letter dated May 3, 2016, from an attorney representing the Madison Beach Preservation Association to Madison's Chief Zoning Enforcement Officer; (F) a letter dated May 6, 2016, from Madison's Chief Zoning Enforcement Officer to an attorney representing the Madison Beach Preservation Association; (G) a letter dated June 29, 2016, from an attorney representing the Madison Beach Preservation

memorandum of law. (Docket Entry no. 171.) On August 24, 2016, the town of Madison filed a motion for summary judgment and adopted the hotel defendants' motion for summary judgment as its own. (Docket Entry no. 173.) On November 14, 2016, the plaintiffs filed their opposition to the defendants' motions for summary judgment; (Docket Entry nos. 185, 187); along with supporting memorandums of law; (Docket Entry nos. 186, 188);[4] wherein the latter memorandum incorporates the former. On November 28, 2016, the hotel defendants filed a reply; (Docket Entry no. 189); and on December 2, 2016, the town of Madison filed its reply; (Docket Entry no. 190); which simply incorporated the reply of the hotel defendants. On December 8, 2016, the plaintiffs filed surreplies; (Docket Entry nos. 191, 193); wherein the latter incorporates the former; and an affidavit of William H. Clendenen, Jr. (Docket Entry no. 192.) Also on December 8, 2016, the hotel defendants filed an objection to the plaintiffs' surreply; (Docket Entry no. 194); which the court overruled. (Docket Entry no. 194.10.) On December 9, 2016, the town of Madison filed its objection to the plaintiffs' surreply;

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Association to Madison's Chief Zoning Enforcement Officer; (H) excerpts of Chapter 14 of the Madison Town Code; (I) excerpts of the Madison Zoning Regulations; and an affidavit of Lou Carrier with exhibits (A) a printout of a computer screen setting forth the concert schedule on the "grassy strip"; and (B) Madison Beach Hotel's permit request for an outdoor concert on the "W. Wharf Grassy Strip" dated August 19, 2015.

[4]The plaintiffs' exhibits include: an affidavit of Emile Geisenheimer along with exhibits (A, B, C, D) photos of a concert on the "grassy strip"; (F) a photo of a sign of the "Town of Madison Beach Rules"; an affidavit of William H. Clendenen, Jr. along with exhibits (A) excerpts of the Madison Zoning Regulations; (B) a copy of a deed; (C) minutes of a Madison Planning and Zoning Commission meeting held on June 19, 2014; (D) a copy of excerpts of the Madison Zoning Regulations; (E) excerpts of the Madison Zoning Regulations; (F) excerpts of the Madison Zoning Regulations; (G) a Superior Court opinion in *Gaetano* v. *Planning & Zoning Commission*, Superior Court, judicial district of New Haven, Docket Entry no. CV-14-6055046-S (September 25, 2015, *Zoarski, J.T.R.*); (H) excerpts of a deposition of John DeLaura; (I) excerpts of a deposition of Scot Erskine; (J) excerpts of a deposition of David Anderson; an affidavit of Marie Mullaney along with exhibit (A) a photo of a wedding party on the beach; and an affidavit of Cecilia Pfister along with exhibit (A) a photo of a sign on West Wharf Beach Park.

(Docket Entry no. 195); which the court also overruled. (Docket Entry no. 195.10.) On January 5, 2017, the plaintiff filed its motion for permission to file the surreply; (Docket Entry no. 196); which the court granted. (Docket Entry no. 196.10.). Oral argument was heard on both motions at short calendar on December 12, 2016.

DISCUSSION

"[S]ummary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 637, 645, 138 A.3d 837 (2016). "[T]he moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 535, 51 A.3d 367 (2012).

"A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . . [T]he party adverse to such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *Recall Total Information Management, Inc.* v. *Federal Ins. Co.*, 147 Conn. App. 450, 456, 83 A.3d 664 (2014), aff'd, 317 Conn. 46, 115 A.3d 458 (2015). "[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791

A.2d 489 (2002). "A genuine issue has been variously described as a triable, substantial or real issue of fact . . . and has been defined as one which can be maintained by substantial evidence." (Citation omitted; internal quotation marks omitted.) *United Oil Co.* v. *Urban Development Commission*, 158 Conn. 364, 378, 260 A.2d 596 (1969). "[T]he party moving for summary judgment . . . is required to support its motion with supporting documentation, including affidavits." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 324 n.12, 77 A.3d 726 (2013). "The existence of the genuine issue of material fact must be demonstrated by counter-affidavits and concrete evidence." (Internal quotation marks omitted.) *Bruno* v. *Whipple,* 162 Conn. App. 186, 214, 130 A.3d 899 (2015), cert. denied, 321 Conn. 901, 138 A.3d 280 (2016).

I

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

With regards to both counts ten and thirteen, the defendants argue that the plaintiffs have failed to exhaust their available administrative remedy: an appeal to the town's zoning board of appeals. The plaintiffs argue the following: regarding the variance, they do not have a decision from which to appeal; and regarding the zoning regulations, they are not required to exhaust administrative remedies.

"It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter." (Internal quotation marks omitted.) *Piquet* v. *Chester*, 306 Conn. 173, 179, 49 A.3d 977 (2012). General Statutes § 8-6 (a) (1) provides the right to appeal to the local zoning board of appeals "where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of [zoning laws] or any bylaw, ordinance or regulation adopted [thereunder] . . . ." See also *Reardon* v. *Zoning Board of Appeals*, 311 Conn. 356, 364, 87 A.3d 1070 (2014). General Statutes § 8-7 governs appeals to zoning boards of appeals and provides in relevant part: "The concurring vote of four members of the zoning board of appeals shall be necessary to

reverse any order, requirement or decision of the official charged with the enforcement of the zoning regulations . . . . An appeal may be taken to the zoning board of appeals by any person aggrieved . . . ." See also *Piquet* v. *Chester*, supra, 180 n.6. The Madison Zoning Board of Appeals has the authority to "hear and decide appeals where it is alleged that there is an error in any order, requirements or decisions made by the Zoning Enforcement Officer or any other official charged with the enforcement of these regulations." Madison Zoning Regs. § 13.3.1.

"The failure of a zoning official to bring a zoning enforcement action is not an order, requirement or decision appealable to the board." *Reardon* v. *Zoning Board of Appeals*, supra, 311 Conn. 364. "Even when there is a written communication from a zoning official relating to the construction or application of zoning laws, the question of whether a 'decision' has been rendered for purposes of appeal turns on whether the communication has a legal effect or consequence. Compare *Piquet* v. *Chester*, supra, 306 Conn. 186 ('when a landowner obtains a clear and definite interpretation of zoning regulations applicable to the landowner's current use of his or her property, the landowner properly may appeal that interpretation to the local zoning board of appeals') and *Koepke* v. *Zoning Board of Appeals*, 230 Conn. 452, 457, 645 A.2d 983 (1994) (holding zoning permit constituted appealable decision because it 'constituted the necessary legal authorization for the plaintiff's construction'), with *Holt* v. *Zoning Board of Appeals*, 114 Conn. App. 13, 27, 29, 968 A.2d 946 (2009) (holding letter sent to landowner that consisted of preliminary, advisory opinion on hypothetical situation did not constitute appealable decision because it did not have binding effect); cf. *Sheridan* v. *Planning Board*, 159 Conn. 1, 9, 266 A.2d 396 (1969) (holding no appeal lies from planning board unless its action is 'binding without further action by a zoning commission or other municipal agency')." *Reardon* v. *Zoning Board of Appeals*, supra, 365. "The obvious examples of such appealable decisions would be the granting or denying of building permits and the issuance of certificates of zoning compliance. . . . This interpretation is consistent with the terms used in relation to 'decision' under §§ 8-6 and 8-7 — 'order'

and 'requirement' — which similarly import legal effect or consequence." (Citations omitted.) Id., 366-67.

Our Supreme Court has consistently held that there exists an exception to the exhaustion doctrine whereby "[a]ny person specifically and materially damaged *by a violation of the zoning ordinances* which has occurred or is likely to occur on another's land may seek injunctive relief restraining such violation [without exhausting administrative remedies]." (Emphasis in original, internal quotation marks omitted.) *Simko* v. *Ervin*, 234 Conn. 498, 504, 661 A.2d 1018 (1995), citing *Cummings* v. *Tripp*, 204 Conn. 67, 75, 527 A.2d 230 (1987); *Reynolds* v. *Soffer*, 183 Conn. 67, 69, 438 A.2d 1163 (1981); *Karls* v. *Alexandra Realty Corp.*, 179 Conn. 390, 401, 426 A.2d 784 (1980); *Blum* v. *Lisbon Leasing Corp.*, 173 Conn. 175, 180, 377 A.2d 280 (1977); *Fitzgerald* v. *Merard Holding Co.*, 106 Conn. 475, 482, 138 A. 483 (1927). "In all the cases in which we have applied this exception to the exhaustion requirement, the aggrieved party claimed that a zoning regulation had been violated. In the present case, however, the plaintiffs have not alleged a violation of a zoning regulation; instead, they claim that the defendant violated the terms of a variance. Although they now assert that a violation of the terms of a variance constitutes a violation of the zoning regulations, at trial they insisted that the zoning regulations were not at issue. We conclude that the specialized knowledge held by a zoning board of appeals with respect to the terms of a variance that it has granted counsels against allowing the plaintiffs to bypass an appeal to that body. Accordingly, we decline to extend our holding in the *Cummings* line of cases to encompass violations of the terms of a variance." (Footnote omitted.) *Simko* v. *Ervin*, supra, 504-505.

"[W]hen a landowner receives notice from a zoning compliance officer that the landowner's existing use of his or her property is in violation of applicable zoning ordinances or regulations, that interpretation constitutes a decision from which the landowner can appeal to the local zoning board of appeals pursuant to § 8-7 and, when applicable, pursuant to local zoning regulations. Put differently, when a landowner

obtains a clear and definite interpretation of zoning regulations applicable to the landowner's current use of his or her property, the landowner properly may appeal that interpretation to the local zoning board of appeals." *Piquet* v. *Chester*, supra, 306 Conn. 185-86. The court in *Piquet* makes no mention of *Cummings* v. *Tripp*, supra, 204 Conn. 67, and given the factual distinctions between a plaintiff *landowner* claiming that he or she is *not* in violation of zoning ordinances and a plaintiff *neighbor* claiming that he or she is harmed *by a violation* of another, *Piquet* should not be read to erode the exception to the exhaustion doctrine enunciated in the *Cummings* line of cases.

In the present action, the plaintiffs' tenth count sounding in violation of the terms of a variance are, based on the foregoing authority, not exempt from the exhaustion doctrine. The defendants' evidence of a decision of the zoning enforcement officer, however, makes no mention of a variance, and instead, only discusses the zoning regulations. (See Defs.' Mot. Summ. J., DeLaura Aff., Ex. F; Docket Entry no. 170.) Such evidence, therefore, in no way supports the defendants' argument that the plaintiffs had a decision regarding *the variance* from which to appeal.[5] The plaintiffs' thirteenth count sounding in violation of zoning ordinances falls squarely within the exception enunciated in the *Cummings* line of cases; see *Cummings* v. *Tripp*, supra, 204 Conn. 75; and, therefore, the plaintiffs may bring this action without exhausting available administrative remedies. Based on the foregoing, the defendants' motions for summary judgement as to counts ten and thirteen on the ground that the plaintiffs failed to exhaust administrative remedies are denied.

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[5]The defendants' position at oral argument that the letter impliedly provided a decision regarding the variance because it was written in response to a letter that discussed the variance is preposterous at best. If a "failure of a zoning official to bring a zoning enforcement action is not an order, requirement or decision appealable to the board"; *Reardon* v. *Zoning Board of Appeals*, supra, 311 Conn. 364; a failure to provide an opinion regarding a zoning variance – most certainly – is also not appealable. Furthermore, upon review of the letters from which the defendant was responding, while one letter does mention violations of the variance, it only demands enforcement of the *zoning regulations*.

II

THE TOWN CODE AND THE MADISON BEACH & RECREATION COMMISSION

As to counts ten and thirteen, the defendants argue that the town code and the authority delegated thereunder to a local beach and recreation commission precludes application of the variance and zoning regulations to the "grassy strip." The plaintiffs argue that the zoning regulations apply to all land in Madison and are not superseded by the town code.

"[Z]oning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes. . . . Thus, in construing [zoning] regulations, our function is to determine the expressed legislative intent. . . . Moreover, [zoning] regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended . . . *and the words employed therein are to be given their commonly approved meaning*." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Enfield* v. *Enfield Shade Tobacco, LLC*, 265 Conn. 376, 380-81, 828 A.2d 596 (2003). "Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . A court that is faced with two equally plausible interpretations of regulatory language, however, properly may give deference to the construction of that language adopted by the agency charged with enforcement of the regulation." (Internal quotation marks omitted.) Id., 385 (applying zoning enforcement officer's interpretation, which was in line with dictionary definition).

Article II of Chapter 14 of the Madison Town Code provides for the establishment of a beach and recreation commission; see Madison Town Code § 14-26; which has the authority to maintain public parks and beaches. See Madison Town Code § 14-28. The commission's scope of powers is set forth by Madison Town Code § 14-34, which dictates that "all ordinances and resolutions, or parts thereof, in conflict with the provisions and intent of this article are hereby repealed." The scope of the rules of Article II of Chapter 14 is as follows: "The regulations in [Madison Town Code §§ 14-51

– 14-58] concerning the use of public park and beach facilities within the town are hereby adopted, and any portion of any prior ordinance or regulation of the town pertaining to the use of such properties which is inconsistent with the provisions of [Madison Town Code §§ 14-51 – 14-58] is hereby rescinded." Madison Town Code § 14-51. "The town properties known as . . . West Wharf Beach . . . are designated as public park and beach facilities of the town subject to the general management and jurisdiction of the beach and recreation commission except as otherwise provided by Charter or ordinance." Madison Town Code § 14-52. "The following listed activities may be conducted in public park and beach facilities by permit only. . . . Meetings, exhibitions, . . . and theatrical performances . . . ." Madison Town Code § 14-54.

Madison Zoning Regs. § 2.1 provides in relevant part the following: "No land, building, or premises or part thereof, shall hereafter be used . . . except as permitted or required by these zoning regulations . . . ." "Where provisions of the regulations of the State Fire Marshall or of other regulations, ordinances, or statutes impose greater restrictions than the provisions of these regulations, such other regulations, ordinances, or statutes shall govern to the extent of such greater restriction." Madison Zoning Regs. § 16.1.

Based on the plain language of the Madison Town Code, to the extent that it supersedes any portion of the Madison Zoning Regulations, it only does so where it is "in conflict with" or "inconsistent with" the code. See Madison Town Code §§ 14-34, 14-51. The American Heritage College Dictionary (2nd Ed. 1985) defines "conflict" as "[a] state of disagreement and disharmony; clash;" and "inconsistent" as "[n]ot in agreement or harmony, incompatible . . . ." The defendants have failed to point to how the Madison Zoning Regulations are in disagreement with the Madison Town Code. Furthermore, Madison's Chief Zoning Officer testified at a deposition for this action that he does not think that "Chapter 14 of Madison's code and ordinances dealing with parks and recreations supercede[s] Madison's zoning regulations." (See Pls.'s Mem. Opp'n, Clendenen Aff., Ex. H, pp. 37-38; Docket Entry no. 186.) As to the variance, the fact that

the Madison Town Code requires a permit for exhibitions and theatrical performances is also not in conflict with a variance that allows for concerts. For the foregoing reasons, the defendants' motions for summary judgment as to counts ten and thirteen on the ground that the zoning regulations and the variance are precluded by the town code[6] are denied.

III

THE VARIANCE'S APPLICABILITY TO THE "GRASSY STRIP"

As to count ten, the defendants argue that there is no genuine issue of material fact that the variance does not apply to the "grassy strip" because variances run with the land and the plain language of the variance states that it applies to 86 and 88 West Wharf Road. The plaintiff argues that the language of the variance creates a genuine issue of material fact.

"[Z]oning variances run with the property and not with the individual who [obtained] the change." *Reid* v. *Zoning Board of Appeals*, 235 Conn. 850, 860, 670 A.2d 1271 (1996). "By its very definition, a variance is granted with respect to a particular piece of property; it can be enjoyed not only by the present owner but by all subsequent owners." *Garibaldi* v. *Zoning Board of Appeals*, 163 Conn. 235, 239, 303 A.2d 743 (1972). "[A] variance constitutes authority extended to the owner to use his property in a manner forbidden by the zoning enactment." (Internal quotation marks omitted.) *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 678, 111 A.3d 473 (2015).

Although the variance specifies the street address as "86 & 88 West Wharf Road"; (Defs.' Mot. Summ. J., DeLaura Aff., Ex. A, p. 1; Docket Entry no. 170); the variance also states that "[t]ented and outdoor functions: shall be held only in the *Wharf beach*, deck or guest drop-off/parking area on the south side of Parker Avenue." (Emphasis

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[6]It should be noted that the defendants have failed to resolve an issue raised by the court at oral argument: if residents cannot rely on enforcement of zoning regulations or variances for harm caused to them on neighboring public land, *what is their redress*? Such lack of redress would certainly constitute an absurd and unworkable result.

added.) (Defs.' Mot. Summ. J., DeLaura Aff., Ex. A, p. 3; Docket Entry no. 170.) The "grassy strip," according to the defendants, is a portion of West *Wharf Beach* that is "directly adjacent to the south side of the Hotel property." (See Defs.' Mot. Summ. J., DeLaura Aff., ¶¶ 4, 5; Docket Entry no. 170.) Additionally, the variance states that "[t]here shall be no unauthorized use of Town property, including the Town-owned parcel on the beach side of the Wharf property, and no private events shall be held on Town property unless specific Town approval has been obtained." (Defs.' Mot. Summ. J., DeLaura Aff., Ex. A, p. 5; Docket Entry no. 170.) The "grassy strip," according to the defendants, *is town property*. (See Defs.' Mot. Summ. J., DeLaura Aff., ¶¶ 3-5; Docket Entry no. 170.) The plain language of the variance, therefore, creates a genuine issue of material fact as to whether it applies to the "grassy strip." For the foregoing reasons, the defendants' motions for summary judgment as to count ten on the ground that there is a genuine issue of material fact as to whether the variance applies to the "grassy strip"[7] are denied.

CONCLUSION

For the foregoing reasons, the defendants' motions as to count ten are denied because (i) there was no decision issued by the zoning officer from which to appeal,

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[7]It is important to point out that even if there was not a genuine issue of material fact that the variance does not apply to the "grassy strip," the hotel defendants *own and operate* the hotel located at 86 and 88 West Wharf Road; (see Defs.' Answer, First Count, ¶¶ 10, 11; Docket Entry no. 150); and as such, the variance certainly applies to their use of 86 and 88 West Wharf Road. The plaintiffs have submitted evidence that people watch concerts *from the Hotel's balconies*. (See Pls.'s Mem. Opp'n, Geisenheimer Aff. ¶ 5; Docket Entry no. 186.) Is this not use of 86 and 88 West Wharf Road simply because the music flows from next door? According to the variance, "[m]usic amplification or reproduction equipment shall not be operated in such a manner that it is plainly audible at a distance of 50 feet in any direction from the property." (Defs.' Mot. Summ. J., DeLaura Aff., Ex. A, p. 3; Docket Entry no. 170). The plaintiffs have submitted evidence that the amplified music does indeed reach their homes. (See Pls.'s Mem. Opp'n, Geisenheimer Aff. ¶¶ 4, 5; Docket Entry no. 186.) Is this not a violation of the variance simply because the sound being broadcast, *to the hotel* and the surrounding area, emanates from neighboring property?

obviating the exhaustion requirement; (ii) the town code does not preclude application of the variance; and (iii) there exists a genuine issue of material fact as to whether the variance applies to the "grassy strip." As to count thirteen, the defendants' motions are denied because (i) the plaintiffs need not exhaust available administrative remedies and (ii) the town code does not preclude application of the zoning regulations.

Wilson, J. 3/16/2017